IN THE COURT OF APPEALS
FOR DIVISION II

STATE OF WASHINGTON, Respondents, vs. KENNY BAIER, Appellant.	STATEMENT OF ADDITIONAL GROUNDS NO. 48468-4-II

I. FACTS.

The Appellant now comes forth pursuant to **RAP 10.10** to further argue the following issues at hand:

1). That the attorney of record was ineffective in his representation at and before trial,

2). The State had used an unreliable Confidential Informant to conduct this alleged delivery of a controlled substance,

3). The State failed to prove that this crime occurred,

4) The Judge in this matter had committed misconduct,

5). The Prosecutor in this matter had committed misconduct,

6). This Court should have given an alternative sentence to treatment, and

7). This Court should now reverse and remand this matter.

II. ARGUMENT.

DID THE DEFENDANT RECEIVE INEFFECTIVE ASSISTANCE IN THIS MATTER AT HAND?

It is clear that this appellant had received ineffective ass-tance in this matter at hand pursuant to the U.S. Const. Amend.

VI; Wa. Const. Art. 1 § 22.Strickland v. Washington,466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).

This is a case that was based upon an act of a Confidential Informant that was looking for a way out of trouble ready to do anything in order to get high;Maxwell v. Roe,628 F.3d 504-05(2010); and the Informant was to make a good-buy and when looking over the testimony of the detectives this never occurred due to Detective McDonald never seen who Ashley Hall called;1 RP 50; never heard the conversation of who answered the phone (Appellant);1RP 51; that there was **pre-recorded** money that was **never** recovered in this matter; **1RP 100**; making this successful delivery charge a failed attempted to prove any delivery occurred for a profit.State v. Evans,80 Wn.App. 806, 911 P.2d 1344(1996); State v. Wren,115 Wn.App. 922, 65 P.3d 335(2003); State v. Gonzales,83 Wn.App. 587, 922 P.2d 210(1996).

There was a clear issue of whether or not this Informant was credible; Dolan v. King County,172 Wash.2d 299,310, 258 P.3d 20(2011); State v. McKenzie,157 Wash.2d 44,53, 134 P.3d 221(2006) State v. Reed,102 Wash.2d 140,145, 684 P.2d 699(1984); and had this trial Attorney did an investigation in this case and brought forth the Informant to trial; **1RP 155,181-82**; In re Pers. Restraint of Carter,172 Wn.2d 917, 263 P.3d 1241(2011); it would now avoid the issue of this ineffective assistance argument for a failure to investigate here;Lewis v. Wilson,423 Fed.Appx. 153,158-59(3rd Cir. 2011);Harrington v. Richter,562 U.S. 86, 131 S.Ct. 770,784-86, 178 L.Ed.2d 624(2011);Murray v. Schriro,746 F.3d 418,441,463-64(9th Cir. 2014); and this clearly cannot be seen as a tactic after all the argument that was made about

reliability and witness confrontation issues;**1 RP 18,38-40,50-51,115,117,121,122,123,140,259-60;** that is throughout the record and never really procured;Reynoso v. Giurbino,462 F.3d 1099, 1112(9th Cir. 2006); and this was not the best way to represent this appellant at trial;In re Brett,142 Wash.2d at 873, 16 P.3d 601(quoting Sanders v Ratelle,21 F.3d 1446,1456(9th Cir. 1994); Morrison,477 U.S. at 385, 106 S.Ct. 2574; especially since this was the defendants best defense to show that the informant was unreliable and not credible here.Bragg v. Galaza,242 F.3d 1082, 1088(9th Cir. 2001); amended by 253 F.3d 1150(9th Cir. 2001) (quoting Sanders,21 F.3d at 1457));Hendricks v. Calderon,70 F.3d 1032,1036(9th Cir. 1995).

The Appellant knows that there must be a showing of actual prejudice in the representation and that has occurred herein; State v. Munguia,107 Wn.App. 328,340, 26 P.3d 1017(2001)(citing State v. McFarland,127 Wn.2d 322,333, 899 P.2d 1251(1995)),review denied, 145 Wn.2d 1023(2002); and this shows with the unpreparedness of not talking to the informant **prior** to trial;State v. Thomas,95 Wn.App. 732, 976 P.2d 1265(1999); and this court cannot justify this type of unpreparedness;In re Woods,154 Wn.2d at 420; and a proper investigation is a critical stage of a criminal proceeding; United States v. Cronic,466 U.S. 648,654, 104 S.Ct. 2039, 80 L.Ed.2d 657(1984)(quoting McMann v. Richardson,397 U.S. 759,771n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763(1970)); State v. Robinson,153 Wash.2d 689,694, 107 P.3d 90(2005); State v. Heddrick,166 Wn.2d 898,909-10, 215 P.3d 201(2009); State v. Everybodytalksabout,161 Wn.2d 702,708, 166 P.3d 693(2007); and

this is **"NOT A HARMLESS ERROR"** mandating a reversal.Delaware v. Van Arsdali,475 U.S. 673, 89 L.Ed.2d. 674,684-85, 106 S.Ct. 1431(1986); Rose v. Clark,478 U.S. 570, 92 L.Ed.2d 460,470, 106 S.Ct. 3101(1986); State v. Guloy,104 Wn.2d 412,426, 705 P.2d 1182(1985), cert. denied,475 U.S. 1020(1986).

The next issue was when the Attorney of record had requested a dismissal of the case; **1RP 231;** he had failed to prepare a **Knapstad Motion** in regards to the issue;State v. Knapstad,107 Wn.2d at 356-57; and there were multiple questionable issues that had occurred here; **1 RP 202,208,228,249,252, 254,259 and 260;** and all of the elements cannot be proven here due to there is **"no showing"** of any profit being made here due to there was no money that was pre-recorded recovered; **1 RP 100,202,208,249, 254,259-60;** making this insufficient evidence;State v. Green,94 Wn.2d 216,220-21, 616 P.2d 628(1980); that this crime had ever occurred here.State v. Stevenson,128 Wn.App. 179,192, 114 P.3d 699(2005); State v. Hill,83 Wn.2d 558,560, 520 P.2d 618(1974).

This shows that the outcome of these proceedings would have differed but for counsels performance was in fact deficient performance.State v. Grier,171 Wash.2d 17,33, 246 P.3d 1260(2011) 168 Wash.App. 635, 278 P.3d 225(2012).

DID THE PROSECUTOR COMMIT AN ACT
OF MISCONDUCT DURING THE TRIAL ?

The Appellant knows that there needs to be a showing of both improper conduct and resulting prejudice;State v. Fisher,165 Wn.2d 727,747, 202 P.3d 937(2009); and during trial the prosecutor tried to inform the court that the same credibility issues

regarding the Informant that allowed certain testimony in should now not be allowed in; **1 RP 140;** and making leading questions to the detective about how the informant walked up to the suspects vehicle during the transaction seeking a specific answer here; State v. Scott,20 Wash.2d 696,698, 149 P.2d 152(1944); State v. Torres,16 Wash.App. 254,258, 554 P.2d 1069(1976); vouching for the credibility of an informant that waseven available; **2 RP 252,254;** State v. Coleman,155 Wash.App. 951,957, 231 P.3d 212(2010), review denied, 170 Wash.2d 1016, 245 P.3d 772(2011); State v. Smith,162 Wash.App. 833,849, 262 P.3d 72(2011), review denied,173 Wash.2d 1007, 271 P.3d 248(2012); and these actions go to a win at any cost by the state prosecutor.Jenkins v. Artuz, 294 F.3d 284,296 n.2(2d Cir. 2002).

There was a a showing of **self-serving** hearsay statements made by the prosecutor about not needing to prove the reliability of the Confidential Informant; **2RP 252,259-60;**(see also): State v. Finch,137 Wash.2d 792,824-25, 975 P.2d 967,cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239(1999); and how the prosecutor had actually filed these charges 9 months + later after this supposed transaction showing an act of vindictiveness; United States v. Meyer,810 F.2d 1242,1245-46(D.C. Cir. 1987); United States v. Goodwin,457 U.S. 368,372-85, 102 S.Ct. 2485, 73 L.Ed.2d 74(1982); and these acts of personal opinions in closing arguments; **2RP at 259-60;** State v. Rivers,96 Wn.App. 672,674, 981 P.2d 16(1999); amount to a reversal of these convictions and a remand for a new trial.State v. Boehning,127 Wn.App. 518, 111 P.3d 899(2005).

DID THE JUDGE COMMIT MISCONDUCT
DURING THE TRIAL AND SENTENCING?

When this court reflects on the actions of how the Judge had made the determination of issues that certain evidence that was persuasive for the States case at hand that was highly prejudicial towards the defendant; **1RP 61 and 201;** State v. Thomas, 150 Wn.2d 821,874-75, 83 P.3d 970(2004); State v. Johnson,90 Wash.App. 54,69, 950 P.2d 981(1998)(State v. Ortiz,119 Wash. 2d 294,308, 831 P.2d 1060(1992)); State v. DeVincentis,150 Wash. 2d 11,17, 74 P.3d 119(2003)(citing State v. Walker,136 Wash. 2d 767,771-72, 966 P.2d 883(1998)); and this is a clear showing of a one-sidedness in the rulings herein.McMillan v. Castro,405 F.3d. 405,409-10(6th Cir. 2005).

During the sentencing phase the trial court had also the opportunity to sentence this appellant to a drug alternative sentence and considering this is a drug-crime related incident it would have been the proper type of punishment due to it falls under his sentencing conditions pursuant to the **SRA** in regards to the community supervision.State v. Parramore,53 Wash.App. 527, 529, 768 P.2d 530(1989).

This court now has the opportunity to review this sentencing issue that was raised at trial level; **Appendix A 5-6;** for an abuse of discretion.State v. Riley,121 Wn.2d 22,36-37, 846 P.2d 1365(1993);State ex rel. Carroll v. Junker,79 Wn.2d 12,26, 482 P.2d 775(1971).

This determination to not consider this alternative is a plain error.United States v. Pirani,406 F.3d 543,550(8th Cir. 2005) (quoting Johnson v. United States,520 U.S 461,466-67, 117 S.Ct.

These are all issues that the Appellate attorney should have raised but at times are looked over due to the overwhelming amount of cases that are given to them and the limited amount of funds that are given to them for the individuals that are appointed Appellate Attorneys that cause these Appellate Attorneys to become ineffective in their representation and needs to be corrected.In re Pers. Restraint of Netherton,177 Wn.2d 798,801, 306 P.3d 918(2013).

After reviewing all the arguments made in this brief and the Appellate Attorneys brief this court must now state that all the essential elements were not proven herein and must now be reverse and remanded.Jackson v. Virginia,443 U.S at 319, 99 S.Ct. 2781.

These are now a showing that enacts the interests of justice doctrine.State v. Gilbert,68 Wn.App. 379,384, 842 P.2d 1029(1993)

III. CONCLUSION.

The Appellant now asks that this court to grant this motion at hand in full or in part.

I SWEAR UNDER THE PENALTY OF PERJURY THAT ALL STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE

Dated this___day
of_____,2016.

Pro-Se Assistant.

KENNY BAIER
Appellant.

DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

I, Kenny Baier declare that on this 5th day of November, 2016 I deposited the forgoing documents:

STATEMENT OF Additional Grounds

or a copy thereof, in the internal legal mail system of

Olympic Corrections Center

And made arrangements for postage, addressed to: (name & address of court or other party.)

Randall Avery Sutton	Lisa Elizabeth Tabbut	The Cort of Appeals
Kitsap Co. Prosecutors office	Attorney at Law	Division Two
614 Division ST.	Po Box 1319	950 Broadway Suite 300
Port Orchard WA 98366-4614	Winthrop WA 98862-3004	TAcoma, WA. 98402-4454

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Forks, WAshington on 11/5/16
(City & State) (Date)

Kenny Baier
Signature

Kenny Baier
Type / Print Name

APPENDIX

IN THE SUPERIOR COURT OF WASHINGTON
KITSAP COUNTY

THE STATE OF WASHINGTON, Plaintiff,	No. 15-1-00420-2
v.	SENTENCING MEMORANDUM
KENNY EUGENE BAIER, Defendant.	

COMES NOW the defendant, Kenny Eugene Baier, by and through his attorney, Joseph McPherson, and respectfully submits the following for the Court's consideration at his sentencing scheduled for January 15, 2016.

CASE BACKGROUND

Kenny Baier was initially charged by information and arraigned on one count of Delivery of a Controlled Substance for an incident that occurred on November 10, 2014. This information was later amended on November 17, 2015 to Count I, Delivery of a Controlled Substance, and Count II, Sale of a Controlled Substance for Profit. Both of these counts invovled the same incident on November 10, 2014, and both charges

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included a school zone enhancement. Mr. Baier was found guilty by a jury of both counts as well as both enhancements on November 20, 2015.

DOUBLE JEOPARDY AND MERGER

A violation of the prohibition against double jeopardy occurs when a defendant is punished twice for a single act or has received multiple punishments for the same offense. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is "whether in light of legislative intent, the charged crimes constitute the same offense." Id. A court must first consider any express or implicit legislative intent. State v. Freeman, 153 Wash.2d 765, 771-772, 108 P.3d 753 (2005). If the relevant statutes do not expressly authorize multiple convictions, the court then applies the Blockburger "same evidence" test. State v. Graham, at 404 *citing* Blockburger v. U.S., 284 U.S. 299, 52 S.Ct 180, (1932). Under the "same evidence" test, double jeopardy is violated if a defendant is convicted of offenses that are the same in fact and law. State v. Calle, 125 Wash.2d 769, 888 P.2d 155 (1995). If each offense includes elements not included in the other, the offenses are not identical in law, and multiple punishments can be imposed. In the Mattter of the Personal Restraint of Fletcher, 113 Wn.2d 42, 49, 776 P.2d 114 (1989).

Delivery of a Controlled Substance is defined in RCW 69.50.401, and Sale of a Controlled Substance for Profit is defined in RCW 69.50.410. These two statutes

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contain no clearly expressed intent to punish these offenses separately; nor is there any implied intent. Therefore, the court should use the Blockburger test to determine whether these two crimes are the same in law and in fact. The statute for Selling a Controlled Substance for Profit defines sale:

> "To sell means the *passing of title and possession* of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date." RCW 69.50.410(1)(b).

Delivery is defined as:

> "the *actual or constructive transfer* from one person to another of a substance, whether or not there is an agency relationship." RCW 69.50.101(g).

The language used is different, but the "passing of title and possession" means the same thing as "actual or constructive transfer." A person cannot pass title and possession of a substance without making an actual or constructive transfer of that substance. In other words, to sell a controlled substance necessarily means delivering that controlled substance as well. The result is that these two crimes are the same in law. As this case involved only one single transaction, the two counts are the same in fact as well. Because these two crimes are the same in law and fact, a conviction for both counts would violate due process, and the two counts should merge.

Delivery of a Controlled Substance is a class B felony, and it is a level II drug

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offense under the Sentencing Reform Act. Sale of a Controlled Substance is a class C felony, but it is a level III drug offense under the SRA. Despite the fact that Sale for Profit is a more serious offense under the SRA range, it has a lower maximum sentence than Delivery under RCW 9a.20.021. Because Delivery, a Class B felony, is more serious, after merging the two counts, the Delivery should be the conviction that remains after merger.

SAME CRIMINAL CONDUCT

If the court were to find that double jeopardy and merger to not apply to these two counts, then both Count I and Count II should be treated as same criminal conduct under RCW 9.94A.400(1)(a), which states:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In order for separate offenses to "encompass the same criminal conduct" under the statute, three elements must be present: (1) same criminal intent, (2) same time and place, and (3) same victim. The absence of any one of these prongs prevents a finding of same criminal conduct. State v. Vike 125 Wash.2d 407, 410, 885 P.2d 824.

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In this instance, these two counts have the same criminal intent. There is only one transaction involved, which involved the same intent, same time and place, and same victim. Therefore, RCW 9.94A.400(1) would apply and neither of these felonies should score against the other.

DRUG OFFENDER SENTENCING ALTERNATIVE

Mr. Baier is eligible for a DOSA sentence pursuant to RCW 9.94A.660. He has no criminal history which would make him ineligible. His standard range is greater than on year, and he has never received a DOSA sentence. Also, the quantity of drugs in this case is very small. Mr. Baier was convicted of delivering and selling .3 grams of heroin for a price of $60. Given those facts, the court should find that that was a small quantity as described in RCW 9.94A.660(1)(d), which leaves him eligible for this sentence.

The length of a DOSA sentence depends upon how the Court decides the question of merger. If the court determines that these two counts merge, then Mr. Baier would have a sentence range of either 20-60 or 60-60 depending on which count merges into the other.

If the court orders a DOSA and determines a 60-60 sentence range, then the school zone enhancement should be added in for a standard range of 84-84. The midpoint would be 84, so for a prison DOSA, the court should then sentence Mr. Baier to 42 months followed by 42 months of community custody. *See* State v. Gutierrez v.

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Department of Corrections, 146 Wash.App. 151, 188 P.3d 546, (2008) and State v. Mohamed, 187 Wash.App. 630 (2015).

If the court determines a sentence range of 20-60 and then orders a DOSA, then the midpoint is 40 months. Using the calculation described above, the enhancement would be added for a midpoint range of 64. The DOSA sentence would then be 32 months followed by 32 months of community custody.

DATED this 13th day of January, 2016.

Joseph McPherson, WSBA No. 41976
Attorney for Defendant

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